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No. 98-652

In The

Supreme Court of the United States

October Term, 1998

SBC COMMUNICATIONS, INC., *et al.*,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE STATES OF ARIZONA, ARKANSAS, IDAHO, INDIANA, MICHIGAN, MISSISSIPPI, NEW MEXICO, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTRODUCTION

Although the eleven States submitting this amicus brief took different positions below on Petitioner's Bill of Attainder argument (supporting, opposing, and remaining neutral), they nevertheless unite now to urge this Court to grant the Petition and resolve definitively a matter of great importance to all States: whether Sections 271 through 275 of the Telecommunications Act of 1996, 47 U.S.C. §§ 271-275 (entitled "Special Provisions Concerning Bell Operating Companies") are constitutional. With Section 271 proceedings pending in almost three dozen States (and more anticipated), the amici curiae States recognize that it is in everyone's best interests to have this Court declare whether Section 271 is constitutional. Therefore, while purposefully and assiduously avoiding any analysis herein of the underlying merits, the States for now join together to ask the Court to grant the Petition and resolve whether the public resources being expended on Section 271 proceedings are legitimately required or needlessly wasted.

INTEREST OF THE AMICI CURIAE STATES

Congress has mandated through Section 271 that the States must expend their resources participating in an elaborate, multi-tiered review process to regulate certain telecommunications companies. Specifically, Section 271 requires that before a Bell Operating Company ("BOC") may offer long-distance service originating in any State where it operates, the BOC must satisfy certain conditions relating to opening its local exchange markets to

competition. *See* 47 U.S.C. § 271(b)(1). Thereafter, that State's public utility commission, the United States Department of Justice, and the Federal Communications Commission ("FCC") must review the adequacy of the BOC's compliance efforts. 47 U.S.C. § 271(d)(2)(A), (B). The FCC must "consult" with the State to determine if the BOC has satisfied all of the compliance requirements of Section 271(c). 47 U.S.C. § 271(d)(B). Of necessity then, the State's public utility commission must conduct an independent evaluation to determine whether the BOC has, in fact, complied with the alternative requirements in 47 U.S.C. § 271(c)(1).

This elaborate review process has, in practice, become a burden for State public utility commissions. For example, Section 271 proceedings are pending in almost three dozen States.[1] Those proceedings often are quite elaborate, involving multiple rounds of briefing, formal oral argument at hearings, and participation by several interested parties. Because the Section 271 proceedings require significant State resources, the States have a

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[1] The States with known Section 271 proceedings include Alabama, Arizona, Arkansas, California, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, and Section 271 proceedings have essentially been concluded in three other States.

legitimate interest in securing clarification about the constitutionality of Section 271.

REASONS FOR GRANTING THE PETITION

While neither advancing nor disputing the Petitioner's Bill of Attainder arguments, the amici curiae States urge the Court to grant the Petition for three reasons.

First, the constitutional issue that divided the judges in the lower courts deserves this Court's attention. As the Petition emphasizes (at 27-29), the Fifth Circuit majority repeatedly acknowledged confusion as to whether it was even applying the right legal test. That only heightens the need for this Court to step in and clarify the limits of congressional power to single out specified parties for burdens. The opinions of the various federal judges on the constitutionality of Section 271 were split below, with two judges (the majority panel) finding the Act constitutional and two judges (the district court and dissenter) finding it unconstitutional. The confusion caused by their competing opinions likely will engender yet additional litigation elsewhere, thus diverting more public resources to these disputes if this Court does not act.

Second, one of the challenged provisions – Section 271 – essentially requires an extensive process involving significant State resources to review whether a BOC has complied with various conditions before the BOC may provide long-distance service. For example, the Arizona Corporation Commission has had to establish a special procedure to review Section 271 compliance by US West

Communications, Inc., a BOC operating in Arizona. The Commission has ordered that US West must file with the Commission and all interested parties (including the State of Arizona's Residential Utility Consumer Office, twelve private telecommunications companies, and one trade association) detailed information relevant to its compliance with a fourteen-point competitive checklist, derived from Section 271(c)(2)(B), plus information on ten factors concerning the general telecommunications market in Arizona. The Commission has also ordered that the parties may conduct discovery to fully analyze the issues. Thereafter, the Commission may require evidentiary hearings, oral argument, or additional briefing. Given both the State resources required by Section 271, and the split of federal judges on the issue of the constitutionality of Section 271, this Court should grant the Petition and declare whether Congress has properly mandated the expenditure of the States' public resources to handle Section 271 proceedings.

Third, Section 271 litigation is likely to continue because, as a practical matter, the need for BOCs to obtain long-distance approval has given incumbent long-distance service providers enormous incentives to litigate every last issue in the hopes of creating roadblocks to a successful Section 271 application. For instance, one long-distance carrier has brought federal district court suits under Section 252(e)(6) to challenge its interconnection agreements with BOCs in at least 22 States, but, as of a few months ago, that same long-distance carrier had challenged its agreements with GTE (which does not need Section 271 approval) in only three of the twenty-plus States where GTE provides service. In short, Section 271

has spawned litigation, not competition. This Court should take this case and declare whether that litigation is even necessary.

CONCLUSION

The amici curiae States urge the Court to grant the Petition for Writ of Certiorari.

December, 1998

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